United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Clarence O. Spinner, Appellant	)	
vs.	)	No. 18,233
United States of America, Appellee	)	

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FROM A JUDGMENT AND CONVICTION OF ROBBERY

BRIEF FOR APPELLANT

Thomas A. Flannery
Counsel for Appellant
(Appointed by this Court)
916 Union Trust Building
Washington 5, D. C.

STATEMENT OF QUESTIONS PRESENTED

I

Whether, in the absence of objection, it was plain error, for the trial court to fail to find appellant's arrest illegal, although the arrest warrant for appellant was invalid on its face and the affidavit in support of the warrant did not establish probable cause.

II

Whether it was plain error not to suppress appellant's statements secured during a period of illegal detention, in the absence of an objection to their admission into evidence.

III

Whether the trial judge committed prejudicial error by incorrectly answering a question from the jury concerning the evidence in the case.

IV

Whether the failure of trial counsel to question the legality of appellant's arrest, or to object to the admission into evidence of appellant's statements secured during a period of illegal detention and his further failure to object to the trial judge's erroneous answer to a question from the jury constituted ineffective assistance of counsel.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment and conviction of robbery in the United States District Court for the District of Columbia and jurisdiction is conferred upon this court by Title 28, Section 1291, United States Code.

STATEMENT OF THE CASE

In a brief trial which lasted less than three hours appellant was found guilty by a jury on an indictment charging him with robbery and sentenced by the court to a term of imprisonment of from two to six years. The Government's evidence at the trial revealed the following facts:

On Wednesday, February 27, 1963 at about 8:45 P.M. three men entered the Singer Liquor Store located at 4823 Georgia Avenue, N.W. in the District of Columbia (Tr. p. 22). One of the men produced a gun and ordered the employees to give him their money and keep their heads down. Working in the store at this time were the Manager, Stanley I. Singer, his uncle, Hyman Singer, and Gilbert Bennett, a clerk (Tr. pp. 21, 22). Stanley Singer testified that he handed over the

money to one of the robbers, after which the robbers left the store. He then called the police (Tr. p. 22). During the course of the trial Stanley Singer identified the appellant in open court as having been one of the robbers and also testified that he had identified appellant in a police lineup on March 26, 1963 (Tr. pp. 24, 25). He did not testify what time of the day he had gone to No. 1 Precinct and identified the appellant.

Gilbert P. Bennett, the clerk, testified that he was unable to identify any of the robbers (Tr. p. 30). Hyman Singer, the remaining witness to the robbery, was not called to testify at the trial of this case.

Booker Kent, a detective assigned to the Robbery Squad, Metropolitan Police Department, testified that he had investigated this robbery and that as a result of his investigation he had arrested the appellant on March 26, 1963 at 4:45 P.M. (Tr. p. 31). Officer Kent did not testify that he had arrested the appellant pursuant to an arrest warrant although the District Court file in this case contains an arrest warrant which had been issued by the District of Columbia Court of General Sessions on March 15, 1963. This warrant for the arrest of the appellant for the robbery of Stanley Singer on February 27, 1963 commanded

that Clarence O'Dell Spinner be brought before the court forthwith to answer the charge. At the trial appellant's counsel did not request the court to conduct a hearing out of the presence of the jury to determine whether the warrant had been validly issued or whether there had been probable cause to arrest appellant.

Officer Kent testified that after he had arrested the appellant at 4:45 P.M. he drove directly to 300 Indiana Avenue, Police Headquarters, arriving there at 5:15 P.M. (Tr. p. 31). He testified further that the appellant then made a statement to him concerning the robbery and related that while sitting in a beer tavern a man known to him only as "Tom" had approached him and asked him if he wanted to make some money. Officer Kent testified further that appellant told him that he went with this man and another man and entered a car driven by another individual and that some time later on they arrived in the 4800 block of Georgia Avenue (Tr. p. 33). At this point, according to Officer Kent, the appellant stated that the two men in the rear seat of the car got out of the car and changed their clothing and then asked appellant to get out of the car. Appellant allegedly then walked over to the Singer Liquor Store with these men. One of the

men pushed open the door, and the other man pushed appellant inside and announced that they were going to hold the place up. Appellant then stated, according to Officer Kent, that he walked in and stood by the cash register and that the man behind the cash register handed him the money at the direction of the other two men who were armed with guns. One of the two men then took the money from appellant and they left the store. Officer Kent testified that appellant also stated that one of the men known to him as Ralph gave him $15.00 from the proceeds of the holdup and put him out of the car and that he then went home for a short while and later went to church and prayed.

Officer Kent testified that as soon as the appellant had told him his version of the offense, he typed it up and asked appellant to read it and that appellant then read the statement and signed it.

The appellant's signed statement was then introduced into evidence as Government Exhibit No. 1 without objection by appellant's counsel (Tr. pp. 35, 36). The written statement differed in important respects from the oral statement attributed to the appellant by Officer Kent, in that it reflected that the appellant purportedly admitted that he knew the names of the other three individuals, and that this

was "his first and last job" with them. This statement also indicates that appellant allegedly saw the three men on March 1, 1963 subsequent to the robbery. The written statement was completed at 7:15 P.M. (See page 2 of statement attached hereto). The statement does not reflect that appellant was ever advised of his right to have a lawyer, of his right not to make a statement, and that the statement might be used against him. Nor does the record reflect that appellant was so advised prior to giving his oral statement.

On cross-examination Officer Kent testified that he knew the names of the other three men allegedly involved in the robbery and had not brought charges against them (Tr. p. 37). He testified further that he had questioned them about the robbery, that they had denied it and that the witnesses to the robbery could not identify any of them (Tr. pp. 40, 41). On cross-examination Officer Kent admitted that while typing appellant's statement appellant stated that he had been forced at gun point by one of the robbers to participate in the robbery (Tr. p. 40). Officer Kent did not mention this in his testimony on direct examination.

The only witness called by the defense was the appellant. The appellant testified that on the night of February 27, 1963 he was approached by a man he knew

only as "Tom" and that Tom asked him if he wanted to help him to move (Tr. p. 43). He testified that he went with Tom and joined two other men and that sometime later as he started to enter a liquor store to purchase some whiskey he was forced at gun point to accompany the other three men while they robbed the store (Tr. pp. 44-47).

The appellant denied on cross-examination that he had made certain incriminating statements contained in the written statement, Government Exhibit No. 1.

During his closing argument the prosecutor made reference to what he described as the appellant's written confession and pointed out discrepancies between appellant's testimony and the contents of appellant's written statement (Tr. pp. 66, 80). After the jury had ~~returned~~ RETIRED to deliberate, it sent a note to the trial judge asking whether the appellant's confession had been made before or after the lineup (See copy of said note attached to this brief). Upon receipt of the note the trial judge after conferring with counsel answered the note by stating that the confession had been made before the lineup. Counsel for the appellant and the prosecutor agreed with the judge's recollection of the evidence contained in the court's answer to the jury, and interposed no

objection (Tr. pp. 99, 100). The evidence at the trial did not reflect, however, at what time of the day the lineup had been held (Tr. p. 25). Thereafter the jury returned its verdict finding the appellant guilty as charged (Tr. p. 97).

STATUTES AND RULES INVOLVED

Rule 3, Federal Rules of Criminal Procedure:

> "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4(a), Federal Rules of Criminal Procedure:

> "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."

Rule 4(b)(1), Federal Rules of Criminal Procedure:

> "The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner."

Rule 5(a), Federal Rules of Criminal Procedure:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 52(b), Federal Rules of Criminal Procedure:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Constitution of the United States, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF POINTS

1. It was plain error affecting substantial rights of the appellant for the trial court to fail to find that appellant had been illegally arrested when: (a) The arrest warrant for appellant contained in the District Court file was invalid on its face; (b) The

affidavit in support of the said warrant did not establish probable cause.

With respect to Point 1, appellant desires the Court to read the arrest warrant, the affidavit on the back of the arrest warrant and the note sent from the jury to the trial judge, copies of which are attached to this brief

2. The District Court erred in not suppressing appellant's statements when the record clearly reflected that they had been secured during a period of illegal detention.

With respect to Point 2, appellant desires the Court to read Government Exhibit No. 1, e.g. appellant's written statement and the following pages of the reporter's transcript: Tr. 30-35, 56-58, 66, 67, 80. (Copy of appellant's written statement is attached to this brief.)

3. The trial judge committed prejudicial error when he incorrectly answered a question from the jury concerning the testimony at the trial.

With respect to Point 3, appellant desires the Court to read the note from the

jury and the trial judge's reply thereto and the following pages of the reporter's transcript: Tr. pp. 99-101. (Copy of said note and court's reply attached to this brief).

4. The failure of trial counsel to challenge the legality of appellant's arrest or to object to the admission into evidence of appellant's statements coupled with his failure to object to the trial judge's erroneous reply to a question from the jury constituted ineffective assistance of counsel

SUMMARY OF ARGUMENT

The evidence in this case reflected that the appellant was arrested on March 26, 1963 by Officer Booker Kent of the Robbery Squad of the Metropolitan Police Force. The officer did not testify whether he had information concerning the appellant which would have constituted probable cause to believe that the appellant had committed a felony, nor did he testify that he had arrested the appellant pursuant to an arrest warrant. No hearing was requested by appellant's counsel in the trial court to determine the question of probable cause. However, the District Court file contains

an arrest warrant for the appellant in this case which indicates that the complaining witness had not appeared before a judicial officer and sworn to facts constituting probable cause, but that he had merely sworn to certain facts before a deputy clerk of the District of Columbia Court of General Sessions. Nor does it appear that a judge signed the warrant. This was clearly not in compliance with the requirements of Rule 3 of the Federal Rules of Criminal Procedure. Furthermore it appears that no facts were alleged constituting probable cause to believe that appellant had committed the crime.

It appears further that although the arrest warrant specifically commanded that appellant upon his arrest be brought <u>forthwith</u> before the District of Columbia Court of General Sessions to answer the charge, nevertheless the arresting officer took appellant to a police precinct and questioned him for two hours securing oral and written statements from him. At no time during this period of illegal detention was the appellant ever advised of his right to obtain counsel or that he was not required to make a statement and that any statement made by him might be used against him.

Although appellant's counsel in the lower

court did not challenge the legality of the arrest nor move for the suppression of all evidence obtained during the time appellant was illegally detained by the police, it is appellant's contention in this court that the failure to notice these points in the court below constituted plain error affecting substantial rights of the appellant and requires reversal of appellant's conviction by this court. Rule (52(b), Federal Rules of Criminal Procedure.

While the jury was deliberating it sent a note to the trial judge inquiring whether the appellant's "confession" had been given before or after the lineup. The note did not indicate whether it referred to appellant's oral or written statement. Although there was no testimony in the case indicating what time of the day appellant had been identified in the lineup, the trial judge told the jury that the appellant's confession had been made before the lineup. This answer was misleading and highly prejudicial to appellant and clearly not based on the evidence in the case. Although trial counsel failed to object and even agreed with the trial judge's recollection of the evidence, this constituted prejudicial error requiring reversal of appellant's conviction.

Trial counsel's failure to object to the

admission of evidence secured during the time the appellant was being illegally held coupled with his failure to object to the trial judge's misleading answer to the jury's question deprived appellant of effective assistance of counsel and likewise requires reversal of appellant's conviction.

ARGUMENT

I

It was plain error affecting substantial rights of the appellant when the trial court failed to find that the appellant's arrest had been illegal when it appeared that:

(a) The arrest warrant for appellant contained in the District Court file was invalid on its face;

(b) The affidavit in support of the said warrant did not establish probable cause.

(a) During the course of the trial Officer Booker Kent testified that he had arrested the appellant on March 26, 1963 at 4:45 P.M. (Tr. p. 31). No hearing was held out of the presence of the jury to determine the legality of appellant's arrest, since such a hearing was not requested by counsel for appellant, nor ordered

by the court on its own motion. Although Officer Kent did not testify that he had arrested appellant pursuant to an arrest warrant, the District Court file contains an arrest warrant for appellant in this case which had been issued by the District of Columbia Court of General Sessions on March 15, 1963. It is further indicated on the back of the said warrant that appellant was not brought before the District of Columbia Court of General Sessions until March 27, 1963 and that a hearing was then held and bond set in the sum of $5,000. An examination of this warrant reflects that the complaining witness Stanley Singer had appeared before one Robert E. Gaskins, a deputy clerk of the District of Columbia Court of General Sessions, and had sworn that appellant had robbed him on February 27, 1963. It is obvious from an examination of this warrant that the complaining witness never appeared before any judicial officer to swear to the facts constituting the offense. The warrant therefore was invalidly issued since Rule 3 of the Federal Rules of Criminal Procedure specifically provides that a written statement of the essential facts constituting the offense charged shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States. It can not be seriously contended that

a deputy clerk of the District of Columbia Court of General Sessions falls within that category.

This precise point was raised before Judge David A. Pine on March 12, 1963 in the United States District Court for the District of Columbia in the case of United States v. Robert H. Crosby, Criminal Case No. 89-61. In that case Judge Pine suppressed from evidence two confessions made by the defendant following his arrest on the ground that the arrest warrant issued by a judge of the District of Columbia Court of General Sessions was not valid because the complaint had not been made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States (See pages 2, 3 of transcript of proceedings before the Honorable David A. Pine on March 12, 1963 in the case of United States v. Robert H. Crosby, Criminal Case No. 89-61, filed in the United States District Court for the District of Columbia). See also Pugach v. Klein, 1961, 193 F. Supp. 630.

Since the arrest warrant for the appellant was invalid, his subsequent arrest and detention were illegal and all evidence secured thereafter was the product of his illegal arrest and subsequent illegal detention and should have been suppressed from evidence. Wong Sun v. United States, 1963, 371 U.S. 471. Thus

the appellant's statements and the testimony in regard to his identification at the lineup should have been suppressed. Gatlin v. United States, 1963, ____ U.S. App. D.C. ___, 326 F.2d 666; United States v. Meachum, 1961, 197 F. Supp. 803, 5.

Despite the failure of defense counsel in the trial court to bring these points to the attention of the court below, it is nevertheless respectfully submitted that this court should take notice of them under the plain error doctrine. Rule 52(b), Federal Rules of Criminal Procedure; Green v. United States, 1962, 113 U. S. App. D.C. 348, 308 F.2d 303; Simmons v. United States, 1953, 92 U. S. App. D.C. 122, 206 F.2d 427; Taylor v. United States, 1954, 95 U. S. App. D.C. 373, 222 F.2d 398; Payton v. United States, 1955, 96 U. S. App. D. C. 1, 222 F.2d 794.

The failure of the lower court to find the appellant's arrest illegal was such prejudicial error that it resulted in manifest injustice and permitted appellant to be convicted solely on illegally secured evidence.

(b) The arrest of appellant was also illegal since it is apparent from the papers filed in connection with the warrant that probable cause did not exist for his arrest. The affidavit in support of the warrant

does not recite facts sufficient to constitute probable cause to believe that appellant had committed the robbery charged therein. It does not contain any affirmative allegations that affiant spoke with personal knowledge of the matters alleged, nor does it indicate any sources for the complainant's belief that appellant committed the robbery. In the case of Giordenello v. United States, 1958, 357 U. S. 480, 5, 6, the Supreme Court of the United States held that a similar affidavit was insufficient and required reversal, and stated:

> ".....Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth "the essential facts constituting the offense charged," and (2) showing "that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it..." The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that "... no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing ... the persons or things to be seized," of course applies to arrest as well as search warrants. See Ex parte Burford, 3 Cranch 448; McGrain v. Daugherty, 273 U. S. 135, 154-157. The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint "... be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U. S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant

exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a binding of probable cause could be made. We think these deficiences could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer..."

Neither the affidavit on the back of the arrest warrant nor the application for warrant which was sworn to before an Assistant United States Attorney comply with the requirements laid down by the Supreme Court of the United States in Giordenello. Failure to rule the arrest invalid on this additional ground also constituted plain error affecting substantial rights of appellant.

In view of the foregoing appellant's conviction should be reversed and the case remanded to District Court with directions to enter a judgment of acquittal.

II

The District Court erred in not suppressing

appellant's statements when the record clearly reflected that they had been secured during a period of illegal detention.

At the trial Officer Booker Kent testified that after he had arrested appellant he took him to Police Headquarters and questioned him (Tr. p. 31). This was in disregard of the command of the warrant which directed that appellant be brought to the District of Columbia Court of General Sessions forthwith to answer said charge. Under the terms of this warrant the officer had no right to take appellant to Police Headquarters for any purpose.

Although appellant's trial counsel did not object to the admission of the statements secured after his arrest, the court committed plain error affecting substantial rights by not suppressing the statements sua sponte in view of the failure of the officer to comply with the directive contained in the warrant.

An examination of Government Exhibit No. 1 reveals that appellant's written statement was not completed until 7:15 P.M. Officer Kent however testified that he had reduced appellant's statement to writing as soon as he had completed his oral statement (Tr. p. 35). It is obvious that it would not have taken Officer Kent two hours to reduce appellant's brief statement to

typewritten form. The only conclusion that can be drawn is that appellant was taken to Police Headquarters and interrogated for several hours in plain violation of the rule laid down by the Supreme Court of the United States in the case of Mallory v. United States, 1957, 354 U. S. 449, and the holdings of this court in many cases handed down subsequent to the Mallory Case. See Mitchell v. United States, 1963, 114 U. S. App. D.C. 353, 316 F.2d 354; Tatum v. United States, 1962, ____ U. S. App. D.C. ____, 313 F.2d 579; Coleman v. United States, ____ U. S. App. D.C. ____, 313 F.2d 576; Rule 5(a), Federal Rules of Criminal Procedure.

The District Court committed plain error affecting substantial rights of the appellant by not finding sua sponte that the appellant's statements had been secured during a period of unnecessary delay, and in not barring their use in evidence.

Even should it be found that the appellant's oral statement was given shortly after his arrival at No. 1 Precinct and therefore not obtained during a period of unnecessary delay, nevertheless the appellant was severely prejudiced by the admission into evidence of his written statement which was not completed until 7:15 P.M., two and one-half hours after his arrest during which time he was continuously in police custody.

The written statement was not a mere repetition of what appellant had allegedly stated orally but contained additional and highly damaging alleged admissions of appellant which were used by the prosecutor in cross-examination and closing argument (Tr. pp. 56, 57, 58, 66, 67, 80). That the jury in this case placed great weight upon the alleged confessions in this case and also considered the time element is indicated by their question to the trial judge after they had returned to deliberate.

For the foregoing reasons it is respectfully submitted that appellant's conviction be reversed.

III

The trial judge committed prejudicial error when he incorrectly answered a question from the jury concerning the testimony at the trial.

After the jury had ~~returned~~ RETIRED to deliberate the foreman sent a note to the court inquiring whether the appellant had made his confession before or after the lineup. The question was not clear because the jury did not specify whether it was referring to the oral or the written statement. Although the transcript of the proceeding reflects that the complaining witness identified appellant in a lineup on March 26, 1963, it does

not indicate what time of the day the identification had been made (Tr. p. 25). Therefore there was no evidence indicating whether the identification had been made before or after the alleged confessions.

Nevertheless the able trial judge answered the note by informing the jury that the confession had been made before the lineup. This answer was not supported by the testimony adduced at the trial and requires reversal, since it was highly prejudicial to appellant. Of course it is well established that in the Federal Courts the trial judge may commit upon the evidence in a criminal case but the rule is not without limitation and the judge's recitation of the evidence should not mislead the jury. United States v. Briggs, 1889, 8 Mackey 585, 19 D. C. 585; Boatright v. United States, 1939, 105 F.2d 737; Blunt v. United States, 1957, 100 U. S. App. D. C. 266, 244 F.2d 355; Quercia v. United States, 1933, 289 U. S. 466.

The trial judge's misleading answer in this case was unintentional and clearly inadvertent on his part, but it was unfortunately very prejudicial to appellant and requires reversal.

IV

The failure of trial counsel to challenge the

legality of appellant's arrest or to object to the admission into evidence of appellant's statements coupled with his failure to object to the trial judge's erroneous reply to a question from the jury constituted ineffective assistance of counsel.

The transcript of the trial proceeding reveals that this trial began at 10:07 A.M. on September 11, 1963 and that at 2:05 P.M. the jury retired to the jury room to deliberate. Since Court recessed for lunch from 12:30 P.M. until 1:45 P.M., the actual trial of the case was completed in two hours and forty-three minutes. During this brief time, voir dire examination was completed, the jury was sworn, opening statements were made by the prosecutor and defense attorney, four witnesses testified, the prosecutor made closing and rebuttal arguments, defense counsel made his closing argument, and the trial judge instructed the jury on the law.

The record reflects that defense counsel did not request a hearing out of the presence of the jury to challenge either the legality of appellant's arrest or object to the admission into evidence his statements which had been obtained during a period of illegal detention, although it is clear from the record that had such a hearing been held all of the Government's

evidence would have been suppressed and the appellant would have been acquitted.

The failure to request a hearing on these matters out of the presence of the jury cannot be excused on the ground that defense counsel in the exercise of his judgment made a tactical error in that his trial strategy was faulty. There is no explanation for the failure of counsel to raise these points in the lower court and it can only be concluded that his failure to do so was due to his lack of experience in the trial of criminal cases.

In the case of People v. Ibarra, 1963, 34 Cal. Rptr. 863, the Supreme Court of California reversed a narcotics conviction on the ground that the deputy public defender's failure to object to the admission into evidence of heroin allegedly taken from the defendant's person precluded the resolution of crucial factual issues challenging the legality of the search and seizure and thereby reduced the defendant's trial to a farce and a sham and denied defendant his constitutional right to effective aid in the preparation and trial of his case. See also Johnson v. United States, 1940, 71 U. S. App. D.C. 400, 110 F.2d 562; Jones v. Huff, 1945, 80 U. S. App. D.C. 254, 152 F.2d 14; Mills v. United States, 1950, 185 F.2d 137; Constitution of the United States, Amendment VI.

Since the appellant did not have the effective assistance of counsel at his trial, he is entitled to a new trial on this ground.

CONCLUSION

In view of the foregoing it is submitted (1) That this court should remand this case to the District Court with directions to enter a judgment of acquittal or, (2) That this case be remanded to District Court with directions to award a new trial.

Respectfully submitted,

Thomas A. Flannery
Counsel for Appellant
(appointed by this Court)

March 25, 1964.

Form 45 ~~In the Municipal Court for the District of Columbia~~ D.C. Court of General Sessions
Criminal Division

377-63
87 358-63
USW 944-63

District of Columbia, ss: MAR 28 1963 Affidavit No.

To the CHIEF of POLICE of the DISTRICT OF COLUMBIA, Greetings:

Whereas Stanley I. Singer hath upon oath before me Robert E. Gaskins,

a Deputy Clerk of ~~The Municipal Court for the District of Columbia~~ D. C. Court of General Sessions, declared that on the 27th day of February 63, A.D. 19....., at the District aforesaid, one Clarence Odell Spinner

did then and there unlawfully by force and violence, by stealthy seizure and snatching steal, and take carry away from the person and immediate actual possession of Stanley I.Singer

Monies of the value of App. Seven Hundred dollars

of the value of dollars

of the value of dollars

of the value of dollars

all lawful money of the United States, of goods and chattels of Singer Liquor, a body corp.

against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

YOU ARE, THEREFORE, HEREBY COMMANDED to take the said Clarence Odell Spinner and bring him before the said Municipal Court forthwith to answer said charge.

Witness, The Honorable JOHN LEWIS SMITH, JR. LEONARD P. WALSH, Chief Judge of ~~The Municipal Court for the District of Columbia~~ D. C. Court of General Sessions, and the seal of said Court this 15th day of March, A.D. 1963

MAR -29

WALTER P. BRAMHALL
Clerk, ~~The Municipal Court, D.C.~~ D. C. Court of General Sessions

By
Deputy Clerk

Precinct

No. MD 358-63

FILED

MAR 23 1963

HARRY M. HULL, CLERK

UNITED STATES

Clarence Odell Spinner

1347 Euclid St., N. W.

WARRANT

(3)

Robbery

Cept. Mt. Pleasant

WITNESSES

Stanley I. Singer, 8317 Navahoe Dr., Sil. Sp. Md.

William Thoma Haynes, 911 Webster St., N. W.

Det. Sgt., R. A. Eldridge, Rob. Sqs.

Det. B. Kent, same

MAR 27 1963

Defendant informed of:

1. Within Complaint
2. Right to retain Counsel
3. Right to preliminary Examination
4. Defendant is not required to make statement
5. Any Statement made by Defendant may be used against him

MAR 27 1963

....., 19.....

Hearing held Hearing waived

Held to await the action of the Grand Jury

Bond set in the sum of $ 5000, to appear

in The United States District Court for the

District of Columbia.

Committed

Released on bond....., 19.....

Surety

FILED IN CLERK'S OFFICE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA
MAR 27 1963

Let this Warrant Issue

Judge,

Govt Exhibit No. 1 Recd

FILED

FEB 27 1964

HARRY M. HULL, CLERK

TO BE USED WHEN ADMISSION IS MADE
ORAL OR WRITTEN

UNITED STATES VS. CLARENCE ODELL SPINNER, Negro, Male, 28yrs

CRIMINAL CHARGE ROBBERY HOLDUP (GUN)

DATE OF ARREST March 26, 1963

TIME OF ARREST 4:45 P.M.

NAME OF OFFICER MAKING ARREST Det. Booker Kent & Glen A. Hilton Robbery Squad.

DATE AND TIME OF ADMISSION March 26, 1963 5:40 P.M. (Office Robbery Squad.)

NAME OF OFFICERS HEARING ADMISSION Det. Booker Kent & Glen A. Hilton Robbery Squad.

DATE AND TIME OF ARRAIGNMENT

PLACE OF ARRAIGNMENT
(Municipal Court or U.S. Commissioners)

COMMENTS Clarence L. Spinner admitted in the office of the Robbery Squad the above time and date and stated that he was with James Henry Bowling, N/M/23yrs, 1446 R St N.W., or 701 Upshur St N.W., Thomas A. Jackson, N/M/20yrs, 1808 Belmont Rd N.W., and Ralph L. Roberts, N/M/23yrs, 2222 17th St N.W. on the Holdup of the "SINGER LIQUOR STORE INC", 4823 Georgia Ave N.W. on 2-27-63. He stated on the evening of the 2-27-63, Ralph approached him in the Men's room of the Golden Nuggett Cafe (14th & Chapin Sts N.W.) and asked him if he wanted to get some money. Ralph told me to wait until he came back, Ralph & tom left the Golden Naggett, shortly thereafter he observed Ralph and his lady companion, whom he identified as his wife also left the Golden Nuggett. About 7:45 P.M. on 2-27-63, Thomas returned to the Golden Nuggett and stated to Spinner that "Ralph said, come on". Clarence then stated he got into James Bowling car which was parked in front of the Golden Naggett on 14th St N.W., Thomas Jackson & Ralph Roberts was sitting on the back set and he got infront with James Bowling. James then drove to the 1800 Blk 14th St N.W., and Ralph got out and went into the High's store and got a quart of Milk, Tom went into the "Wings & Things Carryout Shop", and bought some wings. (Chicken) they both returned to the car. James then drove up Georgia Ave N.W. to the Liquor store and parked in a alley in back of the store. Clarence stated they (Thomas Jackson, Ralph Roberts) allentered the store and that he walked to the far end of the counter and stood in front of the cash register and that Thomas Jackson had a gun (he don't know what kind of guns Ralph & Tom had) Tom stood midway of the counter and Ralph stood just inside of the door with a gun and told Mr. Singer to keep his head down and don't

(OVER)

look up. Ralph had the gun pointed in the garneral direction of Mr. Singer and the other store clerk (Gilbert Parnell,Bennett, N/M/33yrs, 827 Decatur St N.W.) and told Mr. Singer to give Clarence Spinner the money. Mr. Singer open the cash register and removed more than $700.00 in assorted bills, and handed the money to Clarence and started out the store when Ralph pushed him out the door and Tom came up and took the money out of Clarence's hand and ran around th the car. (James Bowling staid in the car, during the Robbery) Ralph was pulling me by the coat (Clarence Spinner) and we got into the car and James drove off. They let me out at 13th & Upshur Sts N.W., Ralph handed me $15.00 (1-$10 and 1-$5 bill). Clarence stated he caught a cab and went home to 1361 Euclid St N.W. (2nd Floor) Clarence stated stated he staid home about half hour (After 9:00 P.M.) and then went to church at 13th & Fairmont Sts N.W., and prayed. Clarence stated he wanted the good man upstairs to know that he didn't know what was going on. About 9:45 P.M. on 2-27-63 he left the church and went home and stayed there untill the next morning. Clarence stated that this was his first and last job with James, Thomas and Ralph. Clarence stated he saw them Frdday night (3-1-63) in the Golden Nuggett on 14th St N.W., (James, Thomas and Ralph) they just spoke and went over to my girl, (Refuses to give his girl's name or address). Clarence stated he hadn't seen or heard from James, Thomas & Ralph since the night of 3-1-63. Clarence stated he thought that James, Tom & Ralph was going into the store to get something drink but after they got out the car and change there coats he figured something was up, and when infront of the Liquor Store Ralph pushed Clarence into the store and he went down the counter and held his hand out.

Clarence O. DeSpain
3-26-63
time 7:15 P.M.

Witness—
Det. Booker Hunt
Det. Sgt. G. Hilton

Did the dependent make his confession before or after he was identified in the line-up?

H. C. Vacker

The confession was made before the lineup.

Lee Yandell
Judge.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,233

CLARENCE O. SPINNER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
GERALD A. MESSERMAN,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Where defense counsel relied on appellant's post-arrest statement after agreeing to its admissibility, and where he approved the trial judge's answering a question helpful to the defense, (received from the jury during their deliberations), both of which actions affirmatively were taken in furtherance of appellant's defense, can he now claim counsel was ineffective in his assistance when the jury rejected the defense?

2. Where the affidavit attached to the warrant set out the essential and sufficient facts on which the crime of robbery was charged, and on the face of the affidavit there appears the signature of a judge of the Court of General Sessions, is the warrant defective under F. R. Crim. P. 4?

INDEX

TABLE OF CASES

* Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Of Clarence O. Spinner's participation in the robbery for which a jury convicted him there was no doubt: he himself told in detail the part he played in the holdup from which he netted a two to six year sentence on October 18, 1963, in the United States District Court.[1] The indictment returned on April 22, 1963 had charged appellant Spinner with the forceful theft of $700 from a northeast Washington liquor store on February 27, 1963.

[1] By order dated April 16, 1964, appellant was released on his personal recognizance pending disposition of this appeal.

At trial on September 11, 1963, the jury's verdict of guilt stood in clear rejection of the only defense offered them, that appellant himself had been forced into an unwilling role in the theft.

Duress was prevued for the venire by appellant's attorney prior to panel selection (Tr. 14-15). A matter of appellant's criminal record for larceny was also tested as a possible source of jury bias by defense counsel, who thereafter in opening statement prior to the Government's case outlined appellant's claim that he was forced into the store by those at whose instigation the holdup was staged. That appellant had freely admitted participation but denied complicity at Police Headquarters following his arrest was the first sentence of this opening statement (Tr. 19).

Two eyewitness store employees and a police detective were called by the Government; appellant testified in his own behalf. The liquor store had been briskly entered by the three men about fifteen minutes before closing (Tr. 22, 29). The man with the gun remained in the middle of the store while a second stood by the door (Tr. 23.) Appellant went to the cash register and received about $700 (Tr. 24, 27). The three then left the store.

The liquor store manager identified appellant as the man to whom he gave the cash (Tr. 24). He recounted that upon receiving the first dole from the till, appellant had ordered him to deliver up the change (Tr. 24). The store clerk also testified he heard appellant ask for money (Tr. 30). Appellant affirmed their account of the action at the store, though denying he made any demand while at the register (Tr. 45-46, 49).

Detective Kent arrested appellant on March 26, 1963 at 4:45 p.m.; he transcribed his statement at the Robbery Squad office where they arrived at 5:15 p.m. (Tr. 31-32). He spoke of appellant's willingness to discuss the robbery (Tr. 32). The statement was devoid of any claim of duress, Kent told, because appellant had mentioned his being under a gun while in the store only as the state-

ment was being typed (Tr. 39-40). Appellant's statement was marked for identification and shown to defense counsel who stated "I don't have any objection to this" (Tr. 36). It was then received in evidence. Appellant's statement included his having received $15.00 for his part in the venture and seen the other participants on March 1, 1963 (Tr. 57).

Appellant's testimony of the fateful evening included explanation that he had been retained to help a man with some moving (Tr. 43). Only just outside the liquor store was the real purpose of his hire divulged, and a threat made that he would participate in the robbery or be blown "way off the street" (Tr. 44). At the sight of the gun, appellant "got limbo, and went in the store" (Tr. 47).

Upon leaving the store, he refused the proffered $15.00 and fled, first home and then to a church (Tr. 45, 52). He later called No. 1 Precinct to see if they "needed anyone by the name of Clarence Spinner," but thereafter did not contact the police about the matter because his "life was at stake" (Tr. 50-51). In his testimony at trial, he categorically denied again seeing the men who had forced him into the store, despite impeachment (Tr. 46-47, 56-57).

Defense counsel at no time sought to test the arrest warrant or the affidavit appended thereto. At the close of all the evidence, and following arguments of counsel, the court charged the jury and they retired to deliberate. After the verdict, sentencing was deferred to allow presentence investigation.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person con-

victed thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 11, District of Columbia Code, Section 705, provides:

> Any judge of the municiple court may at any time including Sundays and legal holidays, on complaint under oath or actual view, issue warrants returnable to the criminal division against persons accused of crimes and offences committed in the District of Columbia. . . .

SUMMARY OF ARGUMENT

Evidence submitted the jury on acquiescence of trial counsel cannot predicate reversal on appeal. Trial counsel not only consented but relied upon appellant's post-arrest statement to the police in attempting to enhance his client's credibility. He consented to the judges reply to a question from the jury three separate times; the answer approved was unquestionably helpful—if not basic—to his cause. These were trial tacticians decisions, not failures or omissions of an incompetent advocate. To successfully show counsel's assistance was ineffective, more must be shown than merely that the defense planned and executed by counsel did not avail.

The cry of ineffective assistance is the hollower when the merits of the supposedly gross errors are examined. The warrant was not inadequate on its face, either in the sufficiency of the sworn facts which outline appellant's participation in an armed robbery, or because a judge did not swear the complainant (since his signature appears on the affidavit). The impeachment for which the statement was used and of which appellant here complains was on a matter collateral to the issue of guilt or innocence. Thus appellant's testimony would have been vulnerable to the same attack even had the statement been excluded.

ARGUMENT

I

Appellant's claimed ineffective assistance of counsel is not supported in the record; nonavailing trial strategy cannot predicate reversal on the facts of this case.

(See Tr. 19, 36, 71, 74-75, 99, 100)

The decisions of this circuit agree that to constitute ineffective assistance of counsel, the advocacy under attack must be so deficient as to constitute the result of the trial a "farce and mockery of justice". *Mitchell* v. *United States*, 104 U.S. D.C. 57, 63, 259 F.2d 787, 793, *cert. denied*, 358 U.S. 850 (1958); *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 7, 148 F.2d. 667, 669, *cert. denied*, 325 U.S. 889 (1945). For

> "[m]ere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel." *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 153, 256 F.2d 707, 708 (1958).

Appellant seeks to "bundle" all of the "alleged failures" of counsel together, *Mitchell* v. *United States*, supra at 59, in order to paint a picture of dismal forensic incompetence in the trial below. To this end, he limns the very same errors he brings to this court onto the fabric of a case wherein "it is clear from the record that had such a hearing [on the legality of the arrest] been held, all of the Government's evidence would have been suppressed and the appellant would have been acquitted" (Br. 23-24). Refutation of this argument and the view of the case on which it depends comes from the bare facts of record.

Initially, it is clear from the record that counsel's decision to allow proof of the confession was a very deliberate one.[2] The first sentence of appellant's defense heard

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[2] Similarly, defense counsel not only affirmatively agreed the judge should answer a question asked by the jury, but also approved the answer (Tr. 100). It was clear from their question

by the jury empaneled to try him was that appellant freely admitted to police his participation in the robbery and his claim that he acted under duress (Tr. 19). Prior to the introduction of appellant's written statement into evidence, the written statement signed by appellant was shown to defense counsel who stated "I don't have any objection to this" (Tr. 36). In closing argument, defense counsel urged the jury that

> Mr. Spinner has admitted . . . [his identity as a participant in the robbery] and has signed a statement to that effect. We don't claim this statement was elicited from him in an unconstitutional manner by coercion or by any other means. Our defense is purely what rested in this man's mind, and in his intent (Tr. 71).
>
> So, I feel that definitely the statement made by the defendant in this case, that there were other people there and these people were the true robbers in this case, certainly should have credence, and there is not one single shred of objective evidence in this case to disprove his story. (Tr. 74-75).

This inclusion of the statement not only was sought, but affirmatively was invoked by defense counsel as part of an effort to generate an aura of candor and truthfulness upon which he felt his client must depend. Appellant cannot now complain that the statements to police did not give credence to his testimony from the stand. *Riddick* v. *United States*, —— U.S. App. D.C. ——, 326 F.2d 650 (1963); *Crawford* v. *United States*, 91 U.S. App. D. C. 234, 198 F.2d 976 (1952). None of the cases cited by appellant cast deliberate use of possibly excludable evidence for tactical reasons as error (Br. 24).

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that the jury thought identification had occured at lineup (Tr. 99); thus it did well for the defense to take the opportunity afforded to assure them that the defendant had confessed *before* he was accosted with his participation by an eyewitness. It is hard to imagine how the answer could prejudice him; his brief here offers no reasons for the unsupported conclusion that it did (Br. 22).

Rather, they fault such as failures to produce evidence which would practically insure successful defense, *Johnson* v. *United States*, 71 U.S. App. D.C. 400, 110 F.2d 562 (1940) (failure to call witnesses who would clear defendant); *Jones* v. *Huff*, 80 U.S. App. D.C. 254, 152 F.2d 14 (1945) (a "crucial" defense was left uninvestigated); failure to move for suppression of evidence indispensible to the Government's case, *People* v. *Ibarra*, 34 Cal. Reptr. 863 (1963)[3] (search of dwelling without a warrant, and choking of defendant in attempt to seize drugs); and failure to warn defendant he had a right to counsel, *Mills* v. *United States*, 185 F.2d 137 (5th Cir. 1950) (counsel appointed only after entry of guilty plea).

Secondly, appellant's rendition that all of the government's evidence would have been suppressed if a hear- had been held and the arrest proved invalid is of another trial than this. No rule of law is cited that would here require suppression of the two eyewitnesses whose testimony put appellant in the store demanding money. Their testimony standing alone would convict. Even had the statements been left untouched by prosecution and defense, the case would still have been for the jury, presenting substantially the same question of appellant's credibility.

In short, ineffectiveness lay not with defense counsel but with the facts at his disposal. "The obligation of counsel is to secure a fair trial, not to see that his client is acquitted regardless of the merits." *Mitchell* v. *United States*, *supra*, at 62, 259 F.2d at 792. See *Crawford* v. *United States*, *supra*, 91 U.S. App. D.C. at 237, 198 F.2d at 979.

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[3] The court in *Ibarra* affirmatively found that failure to object to proof of heroin not an error of judgment or a malfunction of tactics. It was unawareness of a basic rule of law that "any" preparation of the case would have dispelled. 34 Cal. Reptr. at 867.

II. Admission of the statements by appellant to police was not erroneous; its use at trial can not require reversal.

(affidavit supporting warrant for arrest, contained in supplemental record on appeal; Tr. 46-47, 56-57)

Since each of the three grounds for reversal urged by appellant was affirmatively sanctioned by defense counsel below, only if the court agrees that counsel's assistance was ineffective there can these errors be considered under F.R. Crim. P. 52b. Counsel's competence below is the more amply vindicated when it is noted that neither ground now advanced would require suppression of the statement.

The warrant is not invalid on its face. Appellant suggests that sources of the complainant's belief that appellant committed the robbery are not affirmatively included (Br. 17). The complainant names appellant and includes mention that one of the men in the store had a "large black revolver". It continues with "this subject took from me more than $700 in cash which I surrendered to him." It clearly states the essential facts of the crime of robbery and that appellant was the perpetrator. See *Giordonello* v. *United States*, 357 U.S. 480 (1958).

Appellant's charges that the warrant was invalid on its face draws on the suggestion that the complainant was not sworn by a judge. F.R. Crim. P. 3. It appears on the face of the affidavit supporting the warrant, that Judge Andrew Howard did swear the witness, in the course of issuing the warrant (See the back of the affidavit in the supplemental record on this appeal). No more than this is required by 11 D.C.C. 705, or by F.R. Crim. P. 4. See also 11 D.C.C. 712.

Appellant's statement to the police differed from his testimony at trial in only one respect: he denied at trial he saw the other thieves again a few days after the robbery (Tr. 46-47, 56-57). On this appeal appellant's impeachment by his post-arrest disclosure that he later met them again is attacked as "severely prejudicial" (Br.

20). This contention overlooks the law that impeachment with no more than this part of the statement on an issue collateral to the elements of the crime would be proper even if the statement itself had been suppressed. *Tate* v. *United States*, 109 U.S. App. D.C. 13, 283 F.2d 377 (1960).

CONCLUSION

Wherefore, appellee respectfully submits that the judgment of the court below should be affirmed.

DAVID C. ACHESON,
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FRANK Q. NEBEKER,
GERALD A. MESSERMAN,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,233

CLARENCE O. SPINNER,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From a Judgment and Order Of
The United States District Court For
The District of Columbia

Thomas A. Flannery
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Washington, D. C. 20005

Counsel for Appellant
Appointed by this Court

May 5, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,233

CLARENCE O. SPINNER, Appellant

v.

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Appeal From a Judgment and Order of
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REPLY BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

Appellant believes that the issues in this proceeding are clearly drawn by the briefs already submitted. However, several points should be noted with respect to the Government's brief.

I

THE TRIAL JUDGE'S ERRONEOUS REPLY TO THE JURY'S QUESTION REQUIRES THAT APPELLANT BE GRANTED A NEW TRIAL

The Government contends that the trial judge's reply to a question from the jury was unquestionably helpful to his cause (B. R. p. 4). However, the jury's finding of guilty certainly does not indicate that the trial judge's reply was of much help to the appellant. The appellant contends that the able trial judge's reply was not based on the evidence in the case. No one can say what the jury had in mind when their question was sent to the trial judge although one could speculate on several reasons. The appellant respectfully submits that he was entitled to a finding of the jury based on the evidence introduced at the trial and that because of the trial judge's misleading reply to its question the jury considered a fact which had not been proven by the evidence. This was plain error and entitles the appellant to a new trial.

II

THE ARREST WARRANT DID NOT COMPLY WITH THE REQUIREMENTS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Government contends that the arrest warrant was valid since on the face of the affidavit supporting

the warrant it appears that Judge Andrew Howard swore the witness in the course of issuing the warrant (B. R. p. 8). An examination of the document referred to by the Government reveals that it is an application for a warrant and that it contains two separate affidavits. The first affidavit reflects that the complaining witness appeared before an Assistant United States Attorney and swore to certain facts purporting to constitute probable cause. The back of the said application for warrant contains a second affidavit consisting of a series of questions directed to the complaining witness in regard to the names of witnesses, etc. Thereafter appear the signatures of Andrew J. Howard and Lawrence S. Schaffer. Strangely enough, the purported signature of Andrew J. Howard does not appear on the first affidavit nor is his title or position indicated on the second affidavit. Rule 3 of the Federal Rules of Criminal Procedure requires that the complaint shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States. If the application for a warrant is considered to be the complaint in this case, it is invalid because it does not comply with the requirements of Rule 3 of the Federal Rules of Criminal Procedure.

The warrant is also invalid since it does not comply with the provisions of Rule 4(b)(1) of the Federal Rules of Criminal Procedure which requires that it shall be signed by the commissioner. An examination of the warrant in this case reveals that it contains an affidavit reflecting that the complaining witness swore to certain conclusions before a deputy clerk of the District of Columbia Court of General Sessions. However, the arrest warrant was not signed by a judge or commissioner as required by the Rule and is therefore invalid for this additional reason.

III

THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL

The Government in its brief submits that appellant's counsel in the court below was not ineffective and that his decision to allow proof of the confession and to advise the prospective jury of appellant's prior criminal record during a voir dire examination was legitimate trial strategy (B. R. pp. 5, 6). The fact that appellant's counsel mentioned the appellant's prior criminal record on voir dire examination is further evidence of incompetence. Furthermore, the fact that he planned to use the defense of duress did not bar him from also seeking to have appellant's statements suppressed. Had appellant's statements

been suppressed, the Government's case would have collapsed. Defense counsel's ineffectiveness in this regard cannot be explained away by contending that his trial strategy was poor. Trial strategy comes into play when counsel is confronted with a choice of two or more courses of action and must make a considered judgment to pursue one of these courses of action abandoning the alternative courses. Defense counsel in this case was not faced with any such choice. He could have pursued both courses by reserving his opening statement and then interposing his legal defenses, e. g., illegal detention and illegal arrest, out of the presence of the jury. Had he not succeeded in having the Government's evidence suppressed, he could then have invoked his factual defense of duress before the jury. Counsel's failure to do so was not faulty trial strategy but was a grievous oversight on his part and constituted ineffective assistance of counsel.

IV

SHOULD THE ARREST BE FOUND ILLEGAL, APPELLANT MUST BE ACQUITTED

The Government contends that there were two eye witnesses whose testimony placed the appellant in the store demanding money and that there is no rule of law which would require suppression of their testimony even assuming the arrest was invalid (B. R. pp. 2, 7). If the Government

means that two witnesses identified appellant, then the Government is mistaken, for only one witness identified him (T. R. pp. 24, 30). Appellant submits that appellant's statements and the lineup testimony were the product of illegality and should have been suppressed. Appellant further contends that the testimony of the complaining witness was only made possible because of appellant's illegal arrest and that it, too, is tainted and should be suppressed.

However, assuming that the complaining witness' testimony was not suppressable, it is very doubtful that the jury would have convicted appellant on the uncorroborated testimony of one identifying witness and so at the very least he is entitled to a new trial at which the illegally-obtained evidence may not be used.

Respectfully submitted

Thomas A. Flannery
Counsel for Appellant
(Appointed by this Court)

May 5, 1964